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Mitigated Democracy

ABSTRACT: Militant democracy is an attempt to defend democracy against totalitarian parties that would use democratic procedures to rise to power. This article is focused on the consistency of the concept of 'militant democracy'. I argue that what militant democracy defends is not the democratic procedure itself but rather certain rights and the rule of law, and that those elements may in fact be compromised by democracy. This applies both if the democratic procedure is concerned and if democracy is interpreted as a reflection of the will of the people. Those elements may be upheld, but democracy is to be mitigated rather than fortified in order to do so.
Keywords: Militant democracy; Formal democracy; Substantive democracy; Equality; Freedom; State of law

Introduction

Militant democracy is the idea that any change to a democratic state that is so radical that what remains can no longer be qualified as democracy is not acceptable and should be prevented, even if such a change is the outcome of the proper democratic procedure (meaning that the support of a (simple or qualified) majority is decisive for any change to existing laws, including the constitution). The term 'militant democracy' stems from Loewenstein;[1] it has gathered a number of supporters, and is also applied in some states.[2] This article inquires the tenability of 'militant democracy'. The first section focuses on the analysis of 'democracy', and 'militant democracy' in particular. Militant democracy adherents argue that democracy must be defended against its enemies, including those who use the means of democracy to undermine it. In the second section, a specific interpretation of democracy, based on the idea of a people, is examined.

Apart from the conceptual difficulties with which 'militant democracy' is confronted, it may be questioned whether it can be enforced. In the third section I argue that this is not the case. Pointing to the problems of militant democracy prompts the

1 Karl Loewenstein, "Militant Democracy and Fundamental Rights, I", 1937, 423, 430–432

2 Militant democracy is practiced, *inter alia*, in Germany: the German constitution stipulates (article 79), amongst other things, that amendments to the constitution that affect the principles laid down in articles 1 and 20 are inadmissible. (Article 1 speaks of the inviolability of the dignity of man and basic human rights; article 20 states, amongst other things, that Germany is a democratic and social federation ('Bundesstaat').) Another example is Turkey, whose constitution stipulates (article 4) that the first three articles, indicating that Turkey is a democratic, secular republic state governed by the rule of law, and identifying certain cultural elements, constitute irrevocable provisions. Article 14 is also important in this respect: it stipulates that the rights embodied in the constitution may not be used to endanger Turkey's democratic and secular order.

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question whether a more viable alternative exists. Section 4 presents such an alternative, preserving what is characteristic of democracy while addressing the concerns that have led to militant democracy in the first place. The rule of law and certain rights (such as freedom of speech) are important issues, but it remains to be seen whether militant democracy is the most convincing perspective to uphold them.

1. The Theory of Militant Democracy

'Democracy' is an intricate concept. It may be specified as 'formal democracy' or 'substantive democracy'. 'Formal democracy' (or 'procedural democracy') means, simply put, that a procedure is followed to determine what the majority wants, which in representative democracy usually means that a simple majority elects representatives whose viewpoints the voters consider closest to their own, who subsequently translate those viewpoints into legislation.[3] What is crucial here is that there is no a priori restriction with regard to the contents: any outcome is possible in this model. In the case of substantive democracy, by contrast, the contents are decisive. Some outcomes of a majority vote are considered unwelcome and should not be carried out. Militant democracy is a species of substantive democracy: should a majority wish to terminate democracy, this outcome should still not be realized. Various elements constitute substantive democracy. Democracy is associated with certain (human) rights, a moral conception of democracy, the rule of law and/or the meaning of a 'people' (reflecting the original Greek term *demos* in the word 'democracy'). The last issue will be discussed in section 2.

The association of certain rights with 'democracy' is not necessarily strange. In representative democracy, the right to vote and, specifically, the right to cast one's vote on a person or party of one's preference is a necessary condition, just as the freedom of association (for political parties). This is merely a minimal basis, though, and with respect to other rights, such as freedom of speech, the analysis is more difficult. It may be argued that democracy can only function properly if that right exists, but that does not decide the issue what the *extent* of citizens' freedom of speech should be. The European Court of Human Rights' association of freedom and democracy would, then, need a support, which is, however, lacking. It simply states: "Freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man."[4]

It may be true that freedom of expression is vital to the development of individual citizens, but that is not the issue here. Democracy means, rather, that citizens decide the extent of that very freedom. Indicating that it should exist to some extent even if

3 Kelsen's position is an example: he considers democracy to be a mere form or method (Hans Kelsen, *Vom Wesen und Wert der Demokratie*, 1929, § 10 (99)).

4 ECtHR, Handyside v. United Kingdom (Application no. 5493/72) (1976), § 49. A similar formulation is found in a later case: "Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment." ECtHR, Vogt v. Germany (Application no. 17851/91) (1995), § 52.

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they, or at least a majority, wish to restrict it would limit rather than fortify democracy. This is not to say that it would be *desirable* to restrict it, but the only authority to decide precisely that – its desirability – is, in a democratic state, the majority.

There are two difficulties here. The first is that a majority would decide on an important issue for a minority. This argument may also be used in the situation that is decisive for militant democracy, namely, if a majority would seek to end democracy as such. On what basis is it authorized to make such decisions? I would point out that the fact that the majority's decision has consequences for a minority applies to *every* democratic decision that is not supported by all citizens, so practically every democratic decision, for practically no decision is universally supported. The fact that an important issue is concerned is not decisive, for this presupposes that some things are so important that they may never be changed, and, even supposing this were correct, no principle to provide a demarcation between those things that may be changed and those that may not is available on the basis of democracy.

Would it, for example, be acceptable to suspend legislation that reflects the *habeas corpus* principle? (I would not argue this, associating this issue with the rule of law rather than with democracy; the rule of law will be discussed below.) The only reason why basic rights should exist or why democracy itself should not be dissolved seems to consist in the fact that a majority does not want this to happen, which is precisely what (formal) democracy means. Supposing that such an outcome is unacceptable even if a majority desires it would mean that another standard than democracy should be decisive. Such a position may be argued (and I will do so in section 4), but one should not commit the (category) mistake of identifying it with democracy.

Another consideration is that those who seek to end democracy may seem to act paradoxically, as the democratic procedure is used to terminate it. However, terminating democracy is not itself the goal; the goal is rather something the antagonists of democracy (apparently) cannot realize as long as democracy exists. This consideration applies to formal democracy and *a fortiori* to substantive democracy. One may argue that the reason why it applies to the former is of relative little import; after all, if a majority exists, they have the power to do anything they want. Still, a majority is not guaranteed (unless, ironically, the state in question would not be a *democratic* one in the first place), and apart from that, they may want to realize a stable government, not being dependent on the outcomes of elections. In any event, whatever the goal(s) are which the antagonists of democracy have in mind, they merely want to replace democracy by another form of government because they (apparently) want to realize that goal or those goals, for otherwise they would have no interest in changing the form of government.

I have not yet made it clear why formal democracy is to be preferred to substantive democracy and why, in other words, democracy is not just about the procedure but does not also necessarily seek to realize some *goal*.[5] A problem of substantive democ-

5 Incidentally, Schmitt maintains that the procedure is not characteristic of democracy *at all*, and associates parliamentarianism ('Parlamentarismus') rather with liberalism ('Liberalismus') (as he understands it),

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racy is that it produces an amalgam of the procedure (the means) and some content (the goal) other forms of government – supposedly – lack, which would mean that some apparent 'moral high ground' is presupposed. Such a position is difficult to support, however. A basis for a moral appeal is difficult to find, and not only if universal support for such a basis is required, for it clings to notions whose meaning is questionable. A candidate often proffered is '(human) dignity'. As Wolterstorff says:

> "The moral basis of constitutional liberal democracy […] lies in the fact that all adult citizens, whatever their comprehensive doctrine, are treated fairly by virtue of having an equal right to exercise their full political voice. And it lies in the fact that the constitution prohibits the government from violating the fundamental natural rights of citizens. It prohibits the government from violating their inherent dignity."[6]

On what ground(s) this alleged inherent dignity would exist is not clear.[7] If it exists on the basis of being a human being, it must be questioned what makes being human an eligible candidate for having dignity. If a specific candidate is selected to provide the explanation, such an explanation seems to be more easily forthcoming. Reason is a criterion often proffered, being reasonable meaning having dignity, but if the understanding or reason in the sense of theoretical reason is concerned, only a relative difference with non-reasonable beings is accomplished, which is insufficient to provide the basis for the criterion.[8] After all, reason in this sense is merely a means to realize a desired goal, which may be qualified in moral or amoral (or even immoral) terms. Practical reason (to use Kant's phrase) is fraught with greater and more complex difficulties, acting in accordance with it presumably being the basis for having dignity, as autonomy is decisive here.[9] (This is not to be confused with (the more easily understood) autonomy in the legal or political sense, which refers to the right to perform legal transactions.) Autonomy in turn depends on freedom, which cannot be demonstrated, so that it must be postulated.[10] (A similar consideration as before, with respect to 'autonomy', applies here: freedom is not to be identified with negative freedom, i. e., the freedom to do what one wants, not being restrained by other people or officials.) In any event, no compelling reason to accept this basis of morality is presented.

which he distinguishes from democracy (Carl Schmitt, *Die geistesgeschichtliche Lage des heutigen Parlamentarismus*, 1926, 13, 14).

6 Nicholas Wolterstorff, *Understanding Liberal Democracy*, 2012, 137. Cf. Michael Perry, *The Political Morality of Liberal Democracy*, 2010, 2, where the twofold claim to which liberal democracy is committed is said to be "[…] that each and every human being has equal inherent dignity and is inviolable […]."

7 Wolterstorff considers being chosen by God decisive for having worth bestowed on oneself (Wolterstorff (note 6), 199), but does not succeed in making it clear on what basis this would occur, as he grants: "Our possessing human nature provides the potential for friendship between God and us; it's a necessary condition for friendship. But it's not an explanation. The explanation for God's wanting to be friends with us is presumably much like the explanation for why we want to be friends with some fellow human being." Wolterstorff (note 6), 200.

8 Cf. Immanuel Kant, *Die Metaphysik der Sitten*, 1907, 435, 436.

9 Immanuel Kant, *Grundlegung zur Metaphysik der Sitten*, 1903, 436; *Kritik der praktischen Vernunft*, 1908, 87

10 E. g., Kant, *Grundlegung zur Metaphysik der Sitten*, 448, 458–461; *Kritik der praktischen Vernunft*, 132.

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Another approach is Dewey's, who has an ethical conception of democracy, as will be shown in section 2. In this case, an added difficulty appears besides the metaphysical one briefly addressed above. If democracy is indeed an ethical conception and if this is to have a meaning (forgoing the problems just mentioned), it must restrain or forbid conceptions that conflict with it, even if they are shared by a majority. It would, from a formal democracy point of view, be conceptually clearer to consider such a stance as a restriction rather than a confirmation of democracy.

This becomes especially clear once it is inquired what the place of individual rights in democracy is. The issue is admittedly somewhat complicated by the fact that democracy is to be distinguished from liberal democracy, which already follows from what Wolterstorff says. Perry is more explicit: "[…] not every country that can plausibly advertise itself as a democracy is a *liberal* democracy: a democracy committed, first, to the proposition that each and every human being has inherent dignity and is inviolable and, second, to certain rights against government – that is, against lawmakers and other government officials – such as the right to freedom of religion."[11] I will not revisit the issue of the meaning of 'dignity' here, but observe that Perry rightly points to the importance of rights such as the right he mentions; as he contends further on in the same work, "[…] no country is truly a *liberal* democracy unless it recognizes and protects, as a fundamental legal right, the right to religious freedom – the right, that is, to freedom of religious practice."[12]

The import of the distinction between democracy and liberal democracy becomes apparent here.[13] Suppose that a minority would practice a religion in such a way that it would conflict with the prevalent ethical conception. For example, that conception may bring with it that an obligatory vaccination policy exists; the freedom of a citizen who does not want to have his children inoculated for religious reasons (supposing the religious duty is thus interpreted) would be limited if they would be inoculated against his wishes. (Another example is restricting parents' freedom to have their son circumcised for religious reasons, from the consideration that the child should have the opportunity to make that choice as an adult.)[14]

This means that exercising such rights is possible only if democracy is mitigated and not if it is fully realized; exercising them would (obviously not in all cases but

11 Perry (note 6), 9, 10

12 Perry (note 6), 65

13 Plattner, distinguishing between democracy and liberal democracy, argues that this may also in fact be witnessed: "With the downfall since 1975 of scores of authoritarian regimes and their replacement by more or less freely elected governments, there are now many regimes that can plausibly be called democratic but not liberal." Marc Plattner, "From Liberalism to Liberal Democracy", 1999, 121. Incidentally, he identifies liberalism with "constitutional and limited government, the rule of law, and the protection of individual rights" (*ibid*.). I would rather maintain that liberal democracy need not include these elements and is focused on warranting certain freedoms, to which the elements mentioned here may be added but which are not necessarily present, even in a liberal democratic state (cf. Jasper Doomen, *Freedom and Equality in a Liberal Democratic State*, 2014, Introduction, footnote 11 (5)), but the precise meaning of 'liberal democracy' is not a crucial issue here.

14 For clarity: I do not here express my (dis)agreement with any policy but merely use the examples to illustrate the conflict between an ethical conception and certain freedoms.

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certainly in some) evidence a *conflict* with democracy. It is important to observe here that such a conflict is only apparent if a conception of *substantive* democracy is used; in the case of *formal* democracy, no a priori restrictions exist, since *any* outcome is compatible with that conception of democracy.[15] Potentially, this does have the same drawback, albeit via an alternative route: a majority may decide that policies to restrict such rights are to be implemented. *Liberal* democracy in particular may remedy this, guaranteeing such rights even if a majority should want to restrict them, but, again, what this means is that democracy is restricted rather than fully realized. Section 4 deals with this issue.

An important case to discuss in the context of the militant democracy discussion is the Refah Partisi case, in which it was ruled that "[…] no one must be authorised to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society."[16] What the Court says here is understandable, certainly with article 17 of the European Convention on Human Rights in mind: "Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention." The phrase 'democratic society' is not suitable here, though. It must be reminded what the Turkish Constitutional Court rules, namely: activities "[…] incompatible with the rule of law could not be tolerated. […]; The Constitutional Court observed that secularism was one of the indispensable conditions of democracy. In Turkey the principle of secularism was safeguarded by the Constitution, on account of the country's historical experience and the specific features of Islam. The rules of sharia were incompatible with the democratic regime. […] Intervention by the State to preserve the secular nature of the political regime had to be considered necessary in a democratic society."[17]

I pointed out above (note 2, *supra*) to the unchangeable nature of the characteristics of the state of Turkey, entrenched in its constitution: democracy, secularism, republicanism and the rule of law. In that light, the ruling of the Turkish Constitutional Court and, in its wake, the ruling of the European Court of Human Rights (ECtHR) are easy to understand. What is more difficult to understand is the amalgam of democracy and the other characteristics, for they do not compose a meaningful whole and may even conflict amongst themselves. This is in fact evidenced by the Refah Partisi case, for the apparent danger to which the ECtHR points is

15 It may be argued that this issue is academic if rights are involved that are considered important by a majority, but this is misleading, since majorities are not stable. In formal democracy, anyone may at some point become part of a relevant minority. (I say 'relevant' minority: not all minorities are relevant (such as the minority of people who have a degree in Assyriology).)

16 ECtHR, Refah Partisi and others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (2003), § 99

17 ECtHR, Refah Partisi and others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (2003), § 25

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> "[…] Refah's long-term policy of setting up a regime based on sharia within the framework of a plurality of legal systems […]. In view of the fact that these plans were incompatible with the concept of a "democratic society" and that the real opportunities Refah had to put them into practice made the danger to democracy more tangible and more immediate, the penalty imposed on the applicants by the Constitutional Court, even in the context of the restricted margin of appreciation left to Contracting States, may reasonably be considered to have met a "pressing social need"."[18]

Presuming, *arguendo*, that what Refah intended to realize would finally be incompatible with democracy (even with its minimal understanding in the guise of formal democracy), if a majority of the population supported the party, it would still act in accordance with the standards of democracy in dissolving the very form of government it used in order to rise to power. The case is not about democracy as such, but concerns rather the other elements: would there still be a secular state, in which the rule of law would be practiced and in which certain rights, such as freedom of religion and freedom of speech, could still be exercised?[19] Rather than to state that democracy is served by dissolving a party that is supported by a majority, it is more consistent and convincing to argue that one seeks to protect some elements from being eliminated, even if this conflicts with a majority decision, so even if it conflicts with democracy. (Those who defend substantive democracy would have a hard time identifying 'one' here.) I would remind those who would object that democracy itself is at stake (since formal democracy may itself be abandoned in this scenario) of what I mentioned above, that democracy itself is nothing more than a means to realize some goal, whether it be exercising rights, secularism or (by contrast) sharia.

I will readily grant that with respect to some rights, the situation is complicated. Still, the ECtHR's statement that "Democracy thrives on freedom of expression."[20] is, strictly speaking, not correct. The ECtHR does not indicate what the extent of that freedom should be, but democracy, even formal democracy, may function optimally if freedom of expression is allowed, so this is a minor issue. A category mistake is, however, made when it is said:

> "Offences by fundamentalists are directed not only against the abstract democratic idea of the state, but also against real democratic stages with real legal systems and real guarantees of personal rights and freedoms. Hence, a democratic state may have to defend at least its very ex-

18 ECtHR, Refah Partisi and others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (2003), § 132

19 The rule of law and certain rights may be discussed together, by the way, considering their close relation (cf., e. g., Anders Buhelt, "Policing the Law of Fear?", 2012, 180, 181).

20 ECtHR, United Communist Party of Turkey and others v. Turkey (Application no. 133/1996/752/951) (19998), § 57. A similar statement is made in another case: "Pluralism, tolerance and broadmindedness are hallmarks of a "democratic society"." ECtHR, Leyla Şahin v. Turkey (Application no. 44774/98) (2005), § 108 (cf. ECtHR, Refah Partisi and others v. Turkey (Applications nos. 41340/98, 41342/98, 41343/98 and 41344/98) (2003), § 114).

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> istence on behalf of its [citizens]. The legitimacy and range of self-defence is, therefore, a vital question of every democratic system."[21]

Freedom of expression *is* a crucial aspect of *liberal* democracy (leaving the issue here what the extent of said freedom should be),[22] but I have already indicated that liberal democracy is not to be identified with democracy.[23]

The final element – which was also addressed in the Refah Partisi case – to be discussed is the rule of law. The same sort of confusion that was observed before is prevalent here.[24] As Schmitt observes, "*The democratic concept of law* is a political concept, not one of a state of law ('Rechtsstaat'); it is based on the power of the people and expresses that the law is anything the people want; the law is what the people have commanded."[25] Besides, it is not clear what the state that incorporates the rule of law, i. e., the 'state of law', or 'Rechtsstaat', means.[26]

In addition, as Raz points out, the rule of law may more easily be realized in a *non*-democratic state:

> "[…] the rule of law is […] not to be confused with democracy, justice, equality (before the law or otherwise), human rights of any kind or respect for persons or for the dignity of man. A non-democratic legal system, based on the denial of human rights, on extensive poverty, on racial segregation, sexual inequalities, and religious persecution may, in principle, conform to the requirements of the rule of law better than any of the legal systems of the more enlightened Western democracies."[27]

I conclude this section by addressing an influential account from which the problems pointed out readily become apparent. Popper presents the "paradox of democracy" (or "of majority rule", which he considers a more precise alternative): "[…] the pos-

21 Markus Thiel, "'Militant Democracy' and State of Emergency in Germany", 2012, 276, 277

22 It is difficult, if not impossible, to demarcate this extent a priori (e. g., Doomen (note 13), § 10.13 (123, 124); § 11.3 (128, 129)).

23 Another author who fails to distinguish between the two is Ringen: "Democracy has a purpose. It is (or rather, should be) for the good of the persons who live under its governance. It is to help them to live in autonomy and security and to get on reasonably with their lives as they wish. And it is to enable them to trust that they and their children can live as their own masters also in the future. It is, in short, for the freedom of the common man. It's freedom that democracy is finally for." Stein Ringen, *What Democracy Is For*, 2007, 5.

24 Expressed as follows by Markus Thiel (Introduction to *The 'Militant Democracy' Principle in Modern Democracies*, 2009, 1): "[…] according to the most recent development in democratic theory, freedom and security cannot be understood as mere antipodes. The freedoms people have become so fond of require the perpetuation of the democratic system, including fundamental rights and freedoms and, for example, the endurance of the rule of law."

25 "*Der demokratische Gesetzbegriff* ist ein politischer, kein rechtstaatlicher Gesetzbegriff; er geht aus von der potestas des Volkes und besagt, daß Gesetz alles ist, was das Volk will; lex est quod populus jussit […]." Carl Schmitt, *Verfassungslehre*, 1965, 258. Schmitt's conception of the people is problematic, however, as will be shown in the next section.

26 Cf. Carl Schmitt, *Legalität und Legitimität*, 1932, 19.

27 Joseph Raz, "The Rule of Law and Its Virtue", 1999, 14

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sibility that the majority may decide that a tyrant should rule."[28] His position is the following: "All these paradoxes [the paradoxes of freedom, tolerance and democracy] can be easily avoided if we frame our political demands in some such manner as this. We demand a government that rules according to the principles of equalitarianism and protectionism; that tolerates all who are prepared to reciprocate, i. e. who are tolerant; that is controlled by, and accountable to, the public."[29] However, if Popper refers by 'we' to those who want to implement the restrictions, the point is moot, since there is in that case, *ex hypothesi*, no majority that would not want to observe the principles he mentions; if, by contrast, he refers to a majority that would want to subvert them, what he says is obviously false. In any event, no 'paradox' of democracy is at stake; there is, rather, a conflict between democracy and something substantive (such as the rule of law), and the issue is not whether democracy should be *supported* but rather whether it should be *mitigated*, with an appeal to one or more of such substantive elements.

I have tried to make it clear what the problems of a substantive democracy position are, by showing that 'substantive democracy' is in fact a (misleading) amalgam, the artificiality of which becomes evident once a conflict between the element of democracy and one or more of the other elements arises, which appears most clearly in 'militant democracy' cases. One issue has not been addressed: substantive democracy proponents may argue that the procedure is not essential (and Schmitt's position was briefly mentioned above, who even goes so far as to deny that it is part of democracy) and that the meaning of 'the people' should be decisive. This may seem appealing at first sight, as it does justice to the original meaning of 'democracy': the people (*demos*) must rule (*kratein*). I will discuss the tenability of such a stance in the next section.

2. "We, the People"

Substantive democracy is sometimes defended by stressing the importance of 'people'. Schmitt speaks of 'the *substance of equality*' ('die *Substanz der Gleichheit*') to characterize democracy.[30] This need not indicate a substantive position, as even those who defend formal democracy must use some idea of equality in order to determine which people are (equally) allowed to vote.[31] He also speaks, however, of homogeneity ('Homogenität'), and stresses the importance of substantial equality ('substanzielle Gleichheit').[32] Schmitt states that this substance may be qualified in diverse ways, but he is unwilling to agree with a procedure as the decisive criterion,[33] and focuses in-

28 Karl Popper, *The Open Society and Its Enemies. Vol. I: The Spell of Plato*, 1947, 226 (footnote 4 to chapter 7)
29 Popper (note 28), 226 (footnote 4 to chapter 7)
30 Schmitt (note 5), 14
31 Present democratic states, interpreting 'equally' broadly, grant all citizens of a certain age the right to vote (with some exceptions, such as – in some states – prisoners).
32 Schmitt (note 5), 14; Schmitt (note 25), 228 ff.
33 Schmitt (note 5), 14–16

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stead on the will of the people,[34] which may be represented by a minority rather than by a majority.[35] In his own terms, Schmitt upholds militant democracy, pleading a dictatorship ('Diktatur') if the true will of the people is not acknowledged; dictatorship is identified with ('true') democracy.[36] This leads to the conclusion that "democracy can exist without that which is called modern parliamentarianism and parliamentarianism without democracy; and dictatorship is just as little the decisive opposite to democracy as democracy is the one to dictatorship."[37]

In short, then, the people constitute a democratic state. Schmitt says "that every democracy rests on the presupposition of the indivisibly alike, entire, unified people,"[38] speaking, in similar terms as those quoted above, of "a substantive alikeness" ("eine substanzielle Gleichartigkeit").[39] Decisive for Schmitt is the following: "according to the democratic presupposition, the people, being in itself homogeneous, have all the characteristics that contain a guarantee of the justice and reasonableness of the will uttered by it. No democracy exists without the presupposition that the people are good, and its will suffices accordingly."[40] More specifically, "one presupposes that, by virtue of the equal membership to the same people, everyone essentially wants the same, in the same way."[41] One may question whether the unity Schmitt presupposes may realistically be found in a (modern) democratic state, especially if pluralism is considered an important value, as the ECtHR maintains (see section 1).

A more important issue is that the criteria Schmitt proposes – that justice be served, that one be reasonable and good – are vague. This may be considered only an academic problem, but once it is inquired how Schmitt concretizes the homogeneity, it becomes clear that race is a decisive characteristic in this regard:

> "*Sameness*[42] of the German people, united in itself, is […], for the concept of political command of the German people, the necessary presupposition and foundation. When the thought of race

34 'Democracy' is defined as the "identity of ruler and ruled, governing and governed, commander and obeyer." ("[…] Demokratie […] ist Identität von Herrscher und Beherrschten, Regierenden und Regierten, Befehlenden und Gehorchenden.") Schmitt (note 25), 234.

35 Schmitt (note 5), 35, 36

36 Schmitt (note 5), 37

37 "Es kann eine Demokratie geben ohne das, was man modernen Parlamentarismus nennt und einen Parlamentarismus ohne Demokratie; und Diktatur ist ebensowenig der entscheidende Gegensatz zu Demokratie wie Demokratie der zu Diktatur." Schmitt (note 5), 41.

38 "[…] daß jede Demokratie auf der Voraussetzung des unteilbar gleichartigen, ganzen, einheitlichen Volkes beruht […]." Schmitt (note 26), 31. Cf. 43: "Grundsätzlich beruht jede Demokratie, auch die parlamentarische, auf der vorausgesetzten durchgehenden, unteilbaren Homogenität." ("At the core, every democracy, including parliamentary democracy, rests on the presupposed continuous, indivisible homogeneity.")

39 Schmitt (note 26), 31

40 "[…] nach demokratischer Voraussetzung hat das in sich homogene Volk alle Eigenschaften, die eine Garantie der Gerechtigkeit und Vernünftigkeit des von ihm geäußerten Willens enthalten. Keine Demokratie besteht ohne die Voraussetzung, daß das Volk gut ist, und sein Wille infolgedessen genügt." Schmitt (note 26), 27, 28.

41 "[…] man setzt voraus, daß kraft der gleichen Zugehörigkeit zum gleichen Volk alle in gleicher Weise im Wesentlichen das Gleiche wollen." Schmitt (note 26), 31.

42 'Artgleichheit' may in this case also be translated as 'racial equality'.

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> was ever again at the center of attention at the National Socialist German Jurists' day in Leipzig in 1933 […], this was no theoretically contrived postulate. Absent the principle of sameness, the National Socialist State could not exist and its legal functioning would not be imaginable […]."[43]

As for the will of the people, the National Socialist Party ("die Nationalsozialistische Partei") is the only bearer of the political will.[44]

Schmitt's position is, in light of what has been said, difficult to uphold: he defends substantive democracy on the basis of a characteristic (race) that is both questionable and controversial, contravening other conceptions of substantive democracy, showing the difficulty of making it clear which variety of substantive democracy should be upheld. Ironically, Schmitt defends democracy as he understands it against being annihilated, while his position is precisely one of those that others who defend democracy consider to be dangerous, and is an example of an outcome they would seek to prevent through militant democracy.

It may be argued that Schmitt's position fails not because his general idea (what the people as a whole represents rather than a majority should be decisive) is false, but rather because his criterion (race) is unacceptable. Alternatively, one may consider democracy to have a moral or ethical dimension, as Dewey does: "Democracy, in a word, is a social, that is to say, an ethical conception, and upon its ethical significance is based its significance as governmental. Democracy is a form of government only because it is a form of moral and spiritual association."[45] Dewey, too, maintains the notion of a common will (also expressed as a "unity of will"[46]). Elsewhere, Dewey goes even further: "Regarded as an idea, democracy is not an alternative to other principles of associated life. It is the idea of community life itself."[47]

The problem, apart from the one addressed in section 1, of the meaning of ethical notions (or lack thereof), is that a solid basis from which to start is difficult to find. Whatever the merits of his position may be, Schmitt did at least provide such a basis (namely, race). If one subsequently argues that it is unacceptable, one must make it clear why that would be the case, even if (presuming Schmitt would be correct) it was a constitutive element for the German people (at least in 1933) and, in order not to succumb to a forlorn relativism, provide a superior criterion that would be universally acceptable. The candidate of (human) dignity was mentioned above, just as the accompanying problems; apart from those problems, which I will not discuss in detail

43 "*Artgleichheit* des in sich einigen deutschen Volkes ist […] für den Begriff der politische Führung des deutschen Volkes die unumgängliche Voraussetzung und Grundlage. Wenn der Gedanke der Rasse auf dem Nationalsozialistischen Deutschen Juristentag in Leipzig 1933 […] immer wieder in den Mittelpunkt gestellt wurde, so war das kein theoretisch ausgedachtes Postulat. Ohne den Grundsatz der Artgleichheit könnte der nationalsozialistische Staat nicht bestehen und wäre sein Rechtsleben nicht denkbar […]." Carl Schmitt, *Staat, Bewegung, Volk*, 1934, 42.

44 Carl Schmitt, "Der Führer schützt das Recht", 1934, 950

45 John Dewey, *The Ethics of Democracy*, 1969, 240

46 John Dewey (note 45), 232, 237

47 John Dewey, *The Public and Its Problems*, 1984, 328

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here, even those who uphold it will admit that such a notion is so vague that it will be difficult to practically apply it. Perhaps that is precisely its appeal and the reason why it features prominently in (international) legislation: it is so abstract that it is not possible to provide the criteria to apply it, which would bring with it the need to explicate in which cases it would *not* apply.

A final concern that both Schmitt's and Dewey's position raise is how one should deal with freedoms that contravene the presumed common will, such as the citizen mentioned above who does not want to have his children inoculated for religious reasons (or other reasons, for that matter). If such a position is reconciled with the common will, the meaning of the latter (presuming that such exists) is weakened; if, by contrast, the children are obligatorily inoculated, his freedom is restricted, so that an aspect other defenders of substantive democracy uphold is impaired.

This section and the foregoing lead to the conclusion that substantive democracy does not provide the convincing foundation needed to defend militant democracy. Its counterpart, formal democracy, merely regards the procedure, not being principally opposed to any outcome, so that it could not be used by militant democracy adherents.[48] Having examined the conceptual problems of militant democracy, I will now deal with the question whether it can even be practiced.

3. Theory and Practice

Regardless of whether 'militant democracy' is conceptually problematic (as I have argued), an additional concern is whether it can be realized. Suppose militant democracy policies have been implemented in a state and a political party that wants to dissolve democracy[49] has managed to gain so much support that it would rise to power if policies that would reflect formal democracy were in place.[50] It is *ex hypothesi* clear that the party may realize any legislation it wants. Eternity clauses, such as those included in the German and Turkish constitutions, would seem to prevent this outcome: even if all citizens unanimously supported laws conflicting with them, such laws could not be passed. However, as Pound, distinguishing between "the law in the books" and "the

48 It is possible to distinguish between "militant procedural democracy" and "militant substantive democracy" (Gregory Fox and Georg Nolte, "Intolerant Democracies", 1995, 22; cf. 24–26), but such a distinction only confuses matters. I remind the reader of what I argued in section 1, that the goal of those who want to dissolve democracy is always something substantial rather than the form of government itself, which they merely consider an impediment to realize that goal (whatever it may be). With that in mind, only the former of the two denotations appears correct, and I consider "militant substantive democracy" a tautology, in the sense that – while substantive democracy is not necessarily militant – militant democracy is necessarily substantive; I remind the reader of my characterization in section 1, of militant democracy as a species of substantive democracy.

49 For clarity, I suppose that the party would even want to get rid of *formal* democracy.

50 In some systems, qualified majorities (such as a two-thirds majority) are needed in order to make changes to the constitution. In this example, I suppose that the radical changes are indeed supported by a qualified majority.

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law in action", rightly says, "[…] the law in the books will more and more become an impossible attempt to govern the living by the dead."[51] To this may be added that a law, or indeed a constitution, can only provide a metaphorical shield, while an actual one would be wanting against a majority unwilling to respect it. A collection of words cannot prevent a revolt or a coup.[52]

Arguing the contrary is only possible with an appeal to a variety of natural law which should be recognized and which even a majority could and should not thwart. That it could not do so is obviously false, with the observation just made in mind; that it should not do so raises the difficulty of the interpretation of 'natural law', the proper authority to provide it not being universally agreed on. The majority is of course not the proper authority in this view, as this would mean that, contra those who uphold it, the majority should decide whether the constitution should be changed, including eternity clauses; this outcome is precisely what this view opposes, being presented as one of the varieties of militant democracy. Democracy would mean that the only authority to interpret natural law is the majority, or an institution that does so in its place, with its consent. I will not deal with the issue here what, if anything, 'natural law' means; the most cautious position is, in any event, to regard the law (including the constitution) simply as a record of the legislator's decision until proof to the contrary is provided.

Does the failure of militant democracy mean that 'anything goes' and that any majority decision is equally acceptable, or should some restrictions be in place? This is the central question of the final section.

4. Mitigated Democracy: Balancing Democracy and the State of Law

The difficulty of militant democracy is that the elements one seeks to protect – certain rights, moral elements (to buttress such rights or to uphold a societal structure) and the rule of law – are those that are protected *from* rather than *by* democracy. That is why I would rather speak of mitigated democracy than of militant democracy. Mitigated democracy consists in defending the rule of law and certain rights (so the same issues that are important for militant democracy) against democracy. The crucial question is, then, whether it is possible to let the majority vote be decisive while making sure that these elements are respected.

Taking democracy seriously means that no other authority than the majority may decide whether restrictions should be in place. Incidentally, it must be stressed, with what was said in section 3 in mind, that no arguments, including those provided here, may withstand the force of a majority intent on carrying out its will, even if a consti-

51 Roscoe Pound, "Law in Books and Law in Action", 1910, 25

52 One might appeal to international law, in particular article 17 of the European Convention on Human Rights, but, apart from the fact that international law is difficult to enforce, this stance, too, would attest to an undemocratic position, contravening legislation at the national level supported by a majority.

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tution demands that it be restricted in some cases. A first option is to take a pragmatic stance, and demand a qualified majority for changes to be made to the constitution.[53] A threshold to make changes to things of great import is thus realized.

Such a position is defensible, but does attest to a paternalistic attitude towards the populace.[54] As Bentham says, "What is the source of this premature anxiety to establish fundamental laws? It is the old conceit of being wiser than all posterity – wiser than those who will have had more experience, – the old desire of ruling over posterity – the old recipe for enabling the dead to chain down the living."[55] Similarly, Krabbe argues that there is no right to impede any majority decision.[56] Irrespective of whether one accepts such a threshold, it does not offer absolute protection.

A second option is to let an important aspect of the separation of powers be realized, and to let judges be the proper authority to decide whether certain rights and the rule of law are respected. An important caveat here is that judges' decisions must conform to the (democratically realized) constitution lest the other extreme (namely, that the judicial branch is not balanced by the legislative branch) be realized, which may happen if a judge appeals to a principle of natural law.[57] The judiciary functions as a balance to the legislative branch (and the executive branch). While those who hold the legislative power do so as a result of elections, this is not necessarily the case with the judiciary.[58] Judges' power is arguably meritocratic or technocratic (in the broad sense) rather than democratic. The situation is somewhat more complex if judges are elected, since democratic elements are in that case decisive at least for the selection procedure. Mitigated democracy proponents may be critical of such a procedure.

Since even the position of judges who are not appointed on the basis of democratic outcomes depends – indirectly – on a majority decision (their appointment still being based on laws that may be changed on the basis of a majority vote), there is no guarantee that mitigated democracy will remain. All that may keep it in place is an appeal to citizens' self-interest. The general idea behind this is the following. Someone who belongs to a relevant majority may want to restrict some rights of minorities, for example freedom of religion (presuming in this example that the majority of citizens are not religious). Still, at some point he may himself belong to a relevant minority (in the present example, this need not mean that citizens will start adhering to a religion

53 An example (two-thirds majority) may be found in article 79 of the German constitution.

54 An even more paternalistic alternative consists in the state having a duty to convince its citizens of the benefits of (liberal) democracy (Johannes Lameyer, *Streitbare Demokratie*, 1979, 207). This is impossible, for 'the state' as such does not have a conviction, being governed by officials presumably having the support of the majority of the citizens upon whose convictions they act; it would, then, be difficult to see what the basis of the authority of such a conviction would be.

55 Jeremy Bentham, *Anarchical Fallacies*, 1843, 494; cf. 501.

56 Hugo Krabbe, *Ongezonde Lectuur*, 1913, 22

57 Cf. Pound (note 51), 27: "Judges and jurists do not hesitate to assert that there are extra-constitutional limits to legislative power which put fundamental common-law dogmas beyond the reach of statutes. Under such circumstances an imperative theory is too much at variance with the actual situation to find acceptance."

58 I say "not necessarily", for it is possible to use a process of elections (i. e., a democratic process) to appoint judges, which is, for example, the case for some of the (lower) judges in the United States.

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while he remains nonreligious; it may also be the case, for example, that the majority wants to restrict another right, such as freedom of speech, while he does not want anything to change in this regard). Since there is no guarantee of a stable situation (not even if one clings to the idea of a 'people' in Schmitt's sense), it may be in citizens' interest to agree with rights (and the rule of law) being in place even if they do not immediately 'profit' from them. There is no assurance, of course, that citizens will in fact act rationally. One may only express the hope that democracy, or rather liberal democracy (and more specifically mitigated democracy, if the analysis presented here is accepted), will function in such a way that the vote will be a rational one.

Conclusion

I have argued that 'militant democracy' is a confusing notion and in fact a contradiction in terms: securing the democratic procedure is not the actual objective, while the elements its defenders seek to safeguard, which *are* the actual objective – the rule of law, certain rights and moral elements (which are supposed to provide the basis of such rights) –, cannot be inferred from a conception of 'democracy' but are rather limitations on democracy. That is why I have spoken of 'mitigated democracy': should one want to uphold such elements, democracy must be mitigated rather than fortified. The alternative conception of democracy in which the people as a homogeneous whole is decisive, defended perhaps most prominently by Schmitt, is no viable alternative: the idea of a homogenous people is not realistic, being held together by characteristics that are at best vague and at worst harmful to individuals who do not share them. Apart from that, the general difficulty that once the form of government is no longer supported by the majority of the citizens applies here, too. If a sufficient number of individuals no longer recognize themselves as part of the people, the same scenario, *mutatis mutandis*, as in a situation where a conception of substantive democracy that does not appeal to the idea of a unified 'people' is supplied may ensue.

No definitive argument has been produced why formal democracy should be preferred to substantive democracy. Still, I think I have at least shown that the conception of substantive democracy depends on a number of starting points which are too problematical to cling to, so that substituting formal democracy for it would be preferable to the alternative. It would also mean that the basis for the misnomer 'militant democracy' would disappear.

To my analysis, which accepts any outcome of formal democracy, it may be objected that I would equally welcome any decision supported by the majority, such as sharia. That is not the case, but it is not the point I have tried to make here. As long as I live in a democratic state of which I am not the only citizen, my viewpoint is just one among others, and in a democratic state the majority is never wrong, at least *in the political sense*. In other respects, the majority may be wrong, and it would be wiser to appeal to experts. I have indicated how some limitations may be imposed, although even those must in a democratic state still be supported by the majority. Such limi-

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tations demonstrate a militant state of law rather than militant democracy, the state of law being opposed to democracy once the rule of law or certain rights are violated. 'Mitigated democracy' unites democracy and the state of law and may accordingly be identified with 'mitigated state of law' as an alternative to militant democracy.

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